The Railroad Crossing Law of Ohio

Introduction

> The right of the railroad and the traveling public to use the railroad and the highway respectively are co-ordinate and equal. Each should exercise reasonable care so as not to interfere unnecessarily with the other.[1]

The purpose of this article will be to analyze the manner and extent to which the courts of Ohio have construed the above mentioned language, thereby molding and shaping the rights and duties of the particular parties involved in a railroad collision.

The Duty of the Railroad to Warn

Duty to Give a Warning From the Train

While it is true that railroad crossing law is largely judge-made law, the Ohio legislature has set up statutory standards controlling the duty of a railroad to give warnings from its trains. Ohio Rev. Code § 4963.25 specifies that a railroad must keep a headlight shining on its locomotive at night.[2] Section 4955.32 of the Ohio Revised Code provides that the engineer of a train shall sound the bell and whistle when approaching within 80 to 100 rods of a public crossing, or a private crossing the view of which is obstructed. Violation of either safety statute constitutes negligence *per se*.[3] The statute clearly absolves the railroad from the duty of giving a warning at a private crossing which is not obstructed.[4] The actual legal problems arising from this statute are few; the vexing problem is largely one of factual proof. For example, it is quite common for some witnesses to testify that the railroad never blew a whistle; other witnesses, that they did not hear a whistle; yet, more witnesses, that a whistle was actually blown.

A jury issue is not necessarily presented merely because there is a conflict in testimony as to whether a railroad whistle was either heard or blown. For negative testimony to have probative effect, it must be affirmatively shown that such witnesses both must have been in a position to hear the whistle and must have been sufficiently attentive.[5] If such facts are not shown, the question is de-

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[1] Cincinnati v. Luckey, 153 Ohio St. 247, 91 N.E. 2d 477 (1950); Pittsburgh, Ft. Wayne & Chicago Ry. v. Maurer, 21 Ohio St. 421 (1871).

[2] If the train is engaged in interstate commerce then Title 45, §22 et seq. of the U.S. Code, which provides for such a light, pre-empts the field of state legislation. Napier v. Atlantic Coast Line Rd., 272 U.S. 605 (1926).

[3] B. & O. Rd. v. Joseph, 112 F. 2d 518 (6th Cir. 1940), *cert. denied* 312 U.S. 682 (1940).

[4] It has been held that, where there was a clear view of 2,000 feet from a private crossing, that such a crossing could not be deemed obstructed. Burnett v. Erie Rd., 39 Ohio L. Abs. 621 (1944).

[5] Hicks v. B. & O. Rd., 160 Ohio St. 307, 116 N.E. 2d 307 (1953); Patton v. Penna. Rd., 136 Ohio St. 159, 24 N.E. 2d 597 (1939); Carter v. Penna. Rd., 172 F.

cided in the railroad's favor as a matter of law.[6] The court's tendency to find that such negative testimony has no probative value seems to be proportionate, to a certain extent, to the amount of positive credible testimony showing that the whistle was blown.[7]

Actually, a plaintiff cannot rely upon the railroad's negligence in failing to blow the whistle unless the plaintiff was in a position where he could have heard the whistle if it was blown,[8] since under such circumstances the railroad's negligence is not a proximate cause of the accident.

DUTY TO GIVE ADDITIONAL WARNINGS

The problem proffered in this area is, what type of warning from the ground must the railroad give to travelers approaching and crossing the right-of-way? Section 4955.33 of the Ohio Revised Code reads in part:

> At all points where its road crosses a public road at a common grade, each company shall erect a sign with large and distinct letters thereon to give notice of the proximity of the railroad and warn persons to be on the lookout for the locomotive.

It should be noted that this statute requires that only one sign be erected. However, the sign must be so situated as to be visible to third parties from either side of the crossing;[9] violation of this statute constitutes negligence *per se;*[10] thus, if the sign is not erected or is not kept in reasonable repair, the railroad is negligent *per se.*[11] In such a case, plaintiff must affirmatively establish that the sign's defective condition was the proximate cause of the accident.[12]

The above-mentioned statute has been implemented by Ohio Rev. Code § 4907.49 which provides that the Public Utilities Commission may require a watchman or additional warning devices at

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2d 521 (6th Cir. 1949). Of course, if witnesses were in a position to hear and did not hear a railroad signal, such evidence is properly admitted. H. V. Ry. v. Wykle, 122 Ohio St. 391, 171 N.E. 860 (1930).

[6] For example, it has been held that negative testimony may have no probative value whatsoever where witnesses who present such negative testimony are admittedly indoors one-half mile away from the crossing. Hicks v. B. & O. Rd., see note 5, *supra.*

[7] Carter v. Penna. Rd., 172 F. 2d 521 (6th Cir. 1949); Patton v. Penna. Rd., see note 5, *supra.*

[8] Icsman v. N.Y.C. Rd., 85 Ohio App. 47, 87 N.E. 2d 829 (1948); Kramers v. Chesapeake & Ohio Ry., 60 Ohio App. 556, 22 N.E. 2d 227 (1939).

[9] Reed v. Erie Rd., 134 Ohio St. 31, 15 N.E. 2d 637 (1938).

[10] Patterson v. Penna. Rd., 26 Ohio L. Abs. 467 (1938).

[11] Cobb v. Busbey, 152 Ohio St. 336, 89 N.E. 2d 466 (1949).

[12] Accordingly, the Ohio Supreme Court has recently held that where a driver of an automobile drives into the rear section of an engine, a passenger in the automobile cannot recover since defendant's negligence in not maintaining a sign was not a proximate cause of the accident. Cobb v. Busbey, see note 11, *supra.*

any crossing if in the opinion of the Commission the crossing is dangerous. Violation of this section is also said to be negligence *per se*.[13] But it has been held that municipalities cannot require a railroad to erect gates or to supply additional warning devices;[14] a municipality can only require that the crossing be illuminated by a street-light device.[15]

Sections 4955.33 and 4907.49 of the Ohio Revised Code have been construed by the Ohio court as merely requiring a minimum standard. It is quite possible that a railroad can be negligent in failing to provide proper warnings, even though it has complied with the above mentioned statutes. The problem manifests itself in the following manner: In the absence of an order of the Public Utilities Commission can a railroad be deemed negligent in failing to provide more than one sign at any particular railroad crossing? The Ohio Supreme Court has answered this question in the affirmative. If a crossing is "especially dangerous," *i.e.* "extra hazardous" or if there exist "special circumstances," which made additional warning devices necessary for the public safety, the railroad must provide additional warning devices above and beyond the statutory requirements.[16]

The classic problem then arises. What is an extra hazardous crossing? Even a cursory analysis of this phrase compels one to conclude that no clear-cut and axiomatic set of rules can be established. As in the case of judicial construction of any ambiguous legal test, the evolution of the structural pattern must be piecemeal, case by case. Such has been the situation in Ohio. However, it is possible to predict with a certain degree of accuracy the boundaries of this legal standard.

The Ohio court has rather uniformly held as a matter of law that in the open country a railroad is responsible for shrubs, weeds and other natural obstructions on its right-of-way; conversely, the railroad is not responsible for shrubs, weeds and other natural obstructions situated in the open country which are not on its right-of-way. Such being the case, as a matter of law the railroad does not have to provide additional warning devices on the basis that these obstructions not on the right-of-way solely constitute an extra hazardous crossing.[17] The theoretical justification for this rule is rested on the premise that the railroad has no control over these

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[13] Erie Rd. v. Stewart, 40 F. 2d 855 (6th Cir. 1930), *cert. denied* 282 U.S. 843 (1930).

[14] Haugh v. Detroit, Toledo & Ironton Ry., 25 Ohio L. Abs. 123 (1937).

[15] *Ibid.*

[16] Woodworth v. Rd. Co., 149 Ohio St. 543, 80 N.E. 2d 142 (1948); Railroad Co. v. Kistler, 66 Ohio St. 326, 64 N.E. 130 (1902); Cleveland C.C. & I.R. v. Schneider, 45 Ohio St. 678, 17 N.E. 321 (1888).

[17] Detroit, Toledo & Ironton Rd. v. Yeley, 165 F. 2d 375 (6th Cir. 1947).

obstacles and consequently should not have to take such things into consideration.[18] The same reasoning has been applied to man-made obstacles not on the railroad's right-of-way in the open country.[19]

At the other extreme the courts have just as uniformly held that in a populous municipality where the crossing is very heavily traveled, the question as to whether the crossing is extra-hazardous is singularly for the jury.[20] The question is submitted to the jury even though the obstruction be man-made or natural and is not located upon the railroad's right-of-way; yet, it is true that the railroad has no control over these obstacles. The court, however, disregards this argument on the theory that the crossing is only extra-hazardous because of its use by the railroad. There has been some language in the cases to indicate that the boundaries of a municipality determine whether a crossing is located within the open country.[21] It is submitted that this phraseology is more loose than definitive; in fact, it has been expressly held that a crossing within the municipal boundaries of villages and great cities can still be considered as situated in the open country.[22] Further even though some courts tend to define an extra-hazardous crossing as one which is within a municipality, it does not necessarily follow that a crossing can only be extra-hazardous if it is within the boundaries of a municipality; a crossing in the open country which intersects a heavily traveled road may be considered extra-hazardous especially if the road has a marked change of grade.[23] While it has been held that weather conditions in themselves are insufficient to render a crossing extra-hazardous,[24] it is reasonable to conclude that temporary weather conditions, at sometime, may be a *factor* in determining whether a particular crossing was at a given time extra-hazardous.[25]

The Ohio cases may perhaps be reconciled on the theory that

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[18] Railroad Co. v. Kistler, see note 16, *supra;* Lacey v. N.Y.C. Rd., 54 Ohio L. Abs. 417, 85 N.E. 2d 540 (1948).

[19] Jollay v. Penna. Rd., 34 Ohio L. Abs. 514, 38 N.E. 2d 204 (1941).

[20] Railway Co. v. Schneider, see note 16, *supra;* Weaver v. Railway Co., 76 Ohio St. 164, 81 N.E. 180 (1907); Icsman v. N.Y.C. Rd., see note 8, *supra;* D. & T. Elec. Ry. v. Bradford, 19 Ohio App. 266 (1923).

[21] C.C.C. & St. L. Ry. v. Kuhl, 123 Ohio St. 552, 558, 176 N.E. 222, 224 (1931); Loos v. Wheeling & L.E. Ry., 60 Ohio App. 527, 533, 22 N.E. 2d 217, (1938).

[22] Kelting v. C. & O. Rd., 50 Ohio App. 521, 199 N.E. 87 (1934); Clark v. B. & O. Rd., 196 F. 2d 206 (6th Cir. 1952), *cert. denied* 344 U.S. 830 (1952); Carter v. Penna. Rd., see note 5, *supra.*

[23] Although the issue of an extra-hazardous crossing arose on the question of speed, the principle remains unaltered. N.Y.C. Rd. v. Sentle, 54 Ohio App. 488, 8 N.E. 2d 149 (1936).

[24] Capelle v. B. & O. Rd., 136 Ohio St. 203, 104 N.E. 2d 822 (1940); Penna. Rd. v. Stegaman, 22 F. 2d 69 (6th Cir. 1927); B. & O. Rd. v. Reeves, 10 F. 2d 329 (6th Cir. 1926).

[25] Hicks v. B. & O. Rd., see note 5, *supra.*

obstructions in the open country off the railroad's right-of-way and weather conditions are not in themselves the sole bases for a determination that a particular crossing is extra-hazardous. Where there is additional evidence of extra-hazardous conditions, *i.e.*, a very heavily traveled highway, an extreme change in the highway grade, location within a populous community, then the court may admit these same weather conditions and obstructions as evidence of negligence.[26]

A matter of practical importance is presented by the rule requiring the facts, which would establish extra-hazardous conditions, to be pleaded in the plaintiff's petition or complaint.[27] Yet, assuming that the extra-hazardous condition has been properly pleaded, it is reversible error to submit to the jury the question as to whether the crossing was adequately protected by additional warning signs, when there is no evidence of extra-hazardous conditions.[28] Finally, the Ohio Supreme Court has held that, depending upon the individual circumstances, a crossing may be extra-hazardous as to some travelers while not extra-hazardous to others. Plaintiff must, therefore, establish that the crossing is extra-hazardous as to his particular accident. It is insufficient to show merely that the crossing is generally extra-hazardous.[29]

What effect will a train occupying the crossing have upon the duty of the railroad to provide additional warning signs? The Ohio court has adopted what is termed the "pre-emption doctrine." It may be aptly illustrated by this cogent statement of the Ohio Supreme Court:[30]

> Where a railroad train is rightfully occupying its track at a highway intersection, the presence of the train is adequate notice to a traveler that the crossing is pre-empted. Consequently, no additional signs, signals or warnings are required of the railroad company and negligence cannot be imputed to it by reason of their absence.

At first blush, this rule may seem rather harsh, but subjected to analytical inspection, the theory is quite justifiable. Since the only purpose of signs and additional warnings is to provide notice, if the train is occupying the crossing, notice is then given to travelers by its presence. What effect will the "pre-emption doctrine" have upon a violation of Ohio Rev. Code § 4955.33 which provides

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[26] Gibbins v. B. & O. Rd., 92 Ohio App. 87, 109 N.E. 2d 511 (1952); Icsman v. N.Y.C. Rd., see note 7, *supra;* Loos v. Wheeling & L.E. Ry., see note 21, *supra.*

[27] Railroad v. Kistler, see note 16, *supra;* Clark v. B. & O. Rd., see note 22, *supra.*

[28] Lacey v. N.Y.C. Rd., see note 18, *supra;* Haugh v. Detroit, Toledo & Ironton Ry., see note 14, *supra.*

[29] Tanzi v. Rd. Co., 155 Ohio St. 149, 98 N.E. 2d 39 (1951).

[30] Capelle v. B. & O. Rd., see note 24, *supra.*

that the railroad should erect a single sign?[31] It is true that the Ohio court has held that a failure to provide the statutory warning sign is negligence *per se*.[32] However, if an automobile is driven into the side of a train which has pre-empted the crossing, the negligence of the railroad in failing to provide this statutory warning sign is considered not to be the proximate cause of the accident. The reason is that if the driver did not see a huge train completely blocking the crossing, surely he would not have seen a small railroad sign. Actually, the effect of the "pre-emption doctrine" generally absolves the railroad from liability where the railroad fails to provide any warning sign whatsoever. Consequently, where the railroad company left a train stationary across a crossing at night, with no light whatsoever, and did not provide any warning signs with the result that an automobile crashed into the train, it was held that a guest in the automobile could not recover, since the railroad was not negligent in failing to provide additional warnings.[33] While the Ohio Supreme Court at first flatly formulated this doctrine of pre-emption with no explicit exception, later decisions have indicated that there may be exceptional situations where this rule is inapplicable. If the crossing has features of "unusual danger" or is "extraordinarly hazardous," then it may be the railroad's duty to provide additional warning devices even though the train has pre-empted the crossing.[34] Thus, where a traveler drove into the side of a train which had pre-empted a crossing within a populous municipality, the collision occurring at night on a street which had a steep grade, an Ohio appellate court has held that a jury question is presented.[35]

A further refinement to the doctrine of pre-emption is presented by this interesting situation. Can the railroad be deemed legally responsible for a collision occurring while it was violating a statute limiting the time during which a crossing may be blocked?[36] Is the violation of such a statute negligence *per se* when the traveler collides with the train? The Ohio court has held it is not.[37] The basis of the decision is that the statute is not a safety statute; rather the purpose of the statute is to expedite the free flow of traffic on the highway. The traveler in such a situation is simply

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[31] Capelle v. B. & O. Rd., see note 24, *supra;* Canterbury v. Rd. Co., 158 Ohio St. 68, 107 N.E. 2d 115 (1952).

[32] Patterson v. Penna. Rd., see note 10, *supra.*

[33] Canterbury v. Rd. Co., see note 31, *supra;* Reed v. Erie Rd., see note 9, *supra.*

[34] Capelle v. B. & O. Rd., see note 24, *supra.*

[35] Iscman v. N.Y.C. Rd., see note 8, *supra.*

[36] OHIO REV. CODE §5589.21.

[37] Capelle v. B. & O. Rd., see note 24, *supra.*

not within the ambit of the protection afforded by the statute.[38] Yet, if the railroad's blocking of the crossing caused the traveler loss through delay, the traveler can then come within the protection afforded by the statute.[39]

Finally, if the railroad does not give any warning but the traveler already has knowledge of the train in sufficient time to avoid any injury, then the traveler has not relied upon the negligent conduct of the railroad and his injury could not have occurred as the proximate result of the railroad's negligence.[40]

The Railroad's Duty of Lookout

Incumbent upon the engineer of a railroad train is the duty to maintain a vigilant lookout on the track ahead of the train. Essentially, the theoretical and pragmatic basis for the existence of this duty is to secure protection on behalf of the train's passengers.[41] Since the engineer can only discharge this duty to his passengers by keeping a strict lookout upon the track in front of the train, a *fortiori,* the engineer cannot also at the same time have a duty to look to both sides of the track;[42] it follows that a railroad does not owe a duty to constantly maintain a lookout for approaching travelers not on the railroad right-of-way.

As to non-passenger third persons the engineer's standard of care in maintaining a lookout upon the tracks is dependent upon the character and classification of the person crossing the railroad track. As to invitees on the railroad right-of-way, the engineer owes the duty of reasonable care in maintaining a lookout upon the track ahead.[43] However, the railroad does not owe a duty to exercise ordinary care in maintaining a lookout for licensees and trespassers. It is said that in the absence of an implication of consent through custom and usage[44] the railroad does not owe a "duty of active vigilance to especially look" for licensees and trespassers.[45] While it may be simply stated that the railroad owes to in-

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[38] Capelle v. B. & O. Rd., see note 24, *supra.* This result was not reached without conflict. Short v. Penna. Rd., 46 Ohio App. 77, 187 N.E. 737 (1933).

[39] 6 Ohio St. L.J. 234 (1940).

[40] Yeazil v. L. & N. Ry., 13 Ohio App. 499 (1921).

[41] Railroad Co. v. Kistler, see note 16, *supra;* Higgs v. N.Y.C. Rd., 57 Ohio App. 367, 14 N.E. 2d 32 (1937).

[42] Railroad Co. v. Kistler, see note 16, *supra;* Haugh v. Detroit, Toledo & Ironton Ry., see note 14, *supra.*

[43] Railroad Co. v. Kistler, see note 16, *supra;* Blanchet v. Cuyahoga Valley Rd., 62 Ohio L. Abs. 272, 107 N.E. 2d 142 (1951).

[44] B. & I. R.R. v. Snyder, 18 Ohio St. 399 (1868); Smith v. Pittsburgh & W. Ry., 90 Fed. 783 (N.D. Ohio E.D. 1898).

[45] Railway v. Workman, 66 Ohio St. 509, 64 N.E. 582 (1902); Carter v. Erie R.R., 14 Ohio Cir. Ct. (N.S.) 108 (1911).

vitees the duty to exercise reasonable care in maintaining a lookout upon the tracks, the application of this rule has not met with such facile construction. Thus, an Ohio appellate court has held that circumstances may be such that as a matter of law the railroad is not negligent in failing to see, in broad daylight, in invitee — a small child — upon its tracks.[46] Yet, another appellate case has held that a jury question was presented when a larger object — a stalled automobile — was not discerned by the railroad.[47] Further, even assuming that the railroad is negligent in not providing a lookout, the evidence must affirmatively establish that the railroad's failure to keep a lookout was the proximate cause of the injury to the invitee. If the evidence does not show that the invitee on the track was in a position where he could or should have been seen, then the Ohio courts have held that mere conjecture as to casual relationship is insufficient to predicate liability.[48]

Yet if, perchance, the railroad does in fact see the party upon the railroad track, then irrespective of whether the party be invitee, licensee or trespasser, the railroad owes him the duty to exercise reasonable care. Even though the plaintiff is contributorily negligent, a negligent railroad defendant may, under certain circumstances, be held liable; this doctrine is commonly termed "last clear chance."[49] While the Ohio court first held that constructive knowledge of the plaintiff is sufficient to maintain the doctrine of last clear chance,[50] the present view is unequivocable that actual knowledge of the plaintiff is necessary before the doctrine of last clear chance can be properly invoked.[51] However, not only must the railroad actually have knowledge of a third party, but the railroad must have had a reasonable opportunity to avoid the accident after acquiring knowledge.[52] In Ohio, the theoretical rationale of this doctrine is that the plaintiff's antecedent negligence is merely a condition, while the defendant's subsequent negligence is termed the actual proximate cause of plaintiff's injury.

An Ohio Court of Appeals has provided a most provocative and potentially significant decision in this area.[53] The court in

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[46] Penna. Rd. v. Milleson, 51 Ohio App. 528, 2 N.E. 2d 17 (1935).

[47] Higgs v. N.Y.C. Rd., see note 41, *supra*.

[48] Blanchet v. Cuyahoga Valley R.R., see note 43, *supra*.

[49] Erie R.R. v. McCormick, 69 Ohio St. 45, 68 N.E. 571 (1903); Cole v. N.Y.C. Rd., 150 Ohio St. 175, 80 N.E. 2d 854 (1948); Schaaf v. Coen, 131 Ohio St. 279, 2 N.E. 2d 605 (1936).

[50] Railroad Company v. Kassen, 49 Ohio St. 230, 31 N.E. 282 (1892).

[51] Cole v. N.Y.C. Rd., see note 49, *supra;* Ross v. Hocking Valley Ry., 40 Ohio App. 447, 178 N.E. 852 (1931.)

[52] Cole v. N.Y.C. Rd., see note 49, *supra;* Schaaf v. Coen, see note 49, *supra;* Farmer v. P.C.C. & St. L. Ry., 83 Ohio App. 321, 80 N.E. 2d 177 (1947); Hayman v. Penna. Rd., 77 Ohio App. 135, 62 N.E. 2d 724 (1945).

[53] In this case, the defendant railroad operated its train with faulty

the *Meredith* case was not particularly certain whether antecedent negligence by both parties would preclude the doctrine of last clear chance; assuming such to be the case however, the court said that it would term the negligence of a railroad in failing to provide proper brakes as an "existing negligence" rather than as antecedent negligence. The court said to hold otherwise "would under such working of that rule free all railroads from any liability while operating in violation of air brake requirements." The court's argument fails to properly evaluate and consider all relevant criteria of liability. First of all, the court ignores the fact that the doctrine of last clear chance can be applicable only where plaintiff is contributorily negligent.[54] In the second place, the court does not deny that if defendant did not see plaintiff the doctrine of last clear chance would be inapplicable. Thus, the court's supositititious "all or nothing at all" reasoning cannot be supported by established rules of tort liability. In fact, the Ohio Supreme Court has defined the doctrine as applying only where the injury could have been avoided by the exercise of reasonable care *after* the defendant actually had notice.[55] Yet, in the *Meredith* case, plaintiff's injury could not have been avoided by the exercise of reasonable care *after* defendant had notice. Actually, it was "impossible" for defendant to avoid the accident after it acquired knowledge of plaintiff. It is submitted that the test as presently stated by the Ohio Supreme Court would in all probability require a result contra to the *Meredith* case. Certainly, to twist antecedent negligence into the fiction of continuing negligence is to drain the present rule of its meaning and vitality.

Practically speaking, it is particularly difficult to establish negligence on the part of the railroad in failing to comply with its standard of care under the doctrine of last clear chance. The following are some mitigating ajudicative principles which have considerably vitiated the use of this doctrine: In order to invoke the last clear chance, the elements of this doctrine must be affirma-

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brakes in violation of the Federal Safety Appliance Act. The railroad engineer saw plaintiff upon its tracks and, acting reasonably, applied his brakes which were inoperative. Plaintiff asserted the doctrine of last clear chance. Defendant railroad argued that it never did have a last clear chance since after it acquired knowledge of plaintiff's position, it had acted reasonably and its negligence was antecedent to its alleged last clear chance. Fairport P. & E. Ry. v. Meredith, 292 U.S. 589 (1934).

[54] Schaaf v. Coen, see note 49, *supra*.

[55] Cole v. N.Y.C. Rd., see note 49, *supra;* Schaaf v. Coen, see note 49, *supra*. Although the *Meredith* case could perhaps be distinguished on the basis that the policy underlying the federal act required strict compliance by the railroad.

tively alleged in the petition or complaint;[56] moreover, it is said that the engineer owes the *highest* standard of care to his passengers while owing only *ordinary* care to third persons;[57] the standard of care applicable to the engineer being the standard of care of a reasonable man in such an emergency;[58] generally, it is not negligent for the engineer to assume that an approaching third party will stop if under the circumstances the third party would reasonably be put on notice of the train;[59] if the defendant reasonably feels that by a warning, the third party will move from his position of peril, then the defendant is justified in not slowing down;[60] actually, even if it is shown that the defendant saw the plaintiff, the court has held that the defendant acted reasonably whether he increased or decreased the speed of the train.[61]

THE DUTY OF THE RAILROAD AS TO SPEED

Generally, there is no statutory limitation upon the right of a railroad to operate its trains in the open country at any speed which the railroad thinks proper. Moreover, it is a well settled Ohio judicial rule that the doctrine of reasonable care does not require a railroad to observe any set or particular speed limit in the operation of its trains in the open country.[62] In effect, a railroad is allowed to operate its train at unlimited speeds in the open country as long as the speed is commensurate with the maintenance of safety to the railroad's passengers. Protection is afforded to travelers at crossings by the railroad's observance of signals and warnings.[63] Perhaps another basis for judicial cognizance of this view may be found in the maxim that the burden of avoiding a grade crossing collision rests for the most part upon the traveler on the highway.[64]

Since there is no assured clear distance rule, either statutory or judicial, applying to the operation of a train, the railroad when approaching a grade crossing does not have to operate its train at such a speed permitting it to stop and avoid the collision after the

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[56] Hayman v. Penna. Rd., see note 52, *supra.*

[57] Railway Co. v. Workman, see note 45, *supra.*

[58] Railroad Co. v. Kistler, see note 16, *supra.*

[59] However, the courts will not indulge in this presumption where the train fails to comply with its duty to warn so that the traveler would not reasonably be put on notice of the imminent approach of the train. Huntsman v. C. & O. Ry., 82 Ohio App. 65, 80 N.E. 2d 645 (1945).

[60] Robinson v. Penna. Rd., 117 Ohio St. 43, 158 N.E. 83 (1927).

[61] Railroad Co. v. Kistler, see note 16, *supra.*

[62] Railroad Co. v. Kistler, see note 16, *supra;* Hicks v. B. & O. Rd., see note 5, *supra;* Carter v. Penna. Rd., see note 5, *supra.*

[63] Railroad Co. v. Kistler, see note 16, *supra;* Carter v. Penna. Rd., see note 5, *supra.*

[64] Woodworth v. Rd. Co., see note 16, *supra;* Railroad Co. v. Kistler, see note 16, *supra.*

obstruction should have been seen by the railroad.[65]

An important judicial exception has been engrafted upon the general rule that a railroad may operate its train at any speed in the open country. If a particular crossing is "extra-hazardous" or "peculiarly dangerous," the railroad is not allowed to run its train at any speed it thinks proper. Rather, the railroad must operate its trains at a reasonable speed under the particular surrounding circumstances.[66] The exact determination of a particularized reasonable speed is a problem answered only by the vagaries of a jury.

Since a railroad is only allowed to operate its train at high speeds on the basis that safety is secured to road travelers by statutory signals, it follows *a fortiori* that the failure of the railroad to give such warnings may justify the holding that, under such circumstances, the speed of the railroad was negligent.[67] As we have seen under the section, "Duty to Give Additional Warning," the factors creating an extra-hazardous crossing cannot be predicted with any marked assurance. Actually the same rules and decisions in that section apply with equal force to the instant problem.

If a railroad engaged in interstate commerce operates its train with defective brakes in violation of the Federal Safety Appliance Act with the result that the speed of the railroad train cannot be properly controlled, the railroad is negligent *per se*.[68] Unlike the Federal Employer's Liability Act, the contributory negligence of the traveler is available to the railroad as a defense.[69] Further, under Ohio Rev. Code § 723.48, the Ohio legislature has specifically granted to municipalities the power to enact ordinances regulating the speed of railroad trains within the municipalities' limits, subject to the restriction, however, that "such ordinance shall not require a rate of speed of less than 4 miles an hour and in villages having a population of 2,000 or less it shall not require a rate of less than 8 miles an hour. . ."[70] Careful note must be made that this statute makes the delegation of power dependent upon a

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[65] Railroad Co. v. Kistler, see note 16, *supra;* Baker v. N. & W. Ry., 88 Ohio App. 537, 100 N.E. 2d 649 (1951); Shaffer v. N.Y.C. Rd., 66 Ohio App. 417, 34 N.E. 2d 792 (1940).

[66] Railroad Co. v. Kistler, see note 16, *supra;* Gibbins v. B. & O. Rd., see note 26, *supra;* Detroit, Toledo & Ironton Rd. v. Yeley, see note 17, *supra.*

[67] Hicks v. B. & O. Rd., see note 5, *supra.*

[68] 45 U.S.C.A. §§ 1, 9.

[69] Fairport P. & E. Rd. v. Meredith, 292 U.S. 589 (1934).

[70] Ohio Rev. Code §723.48. "The legislative authority of a municipal corporation may, when a railroad track is laid in the municipal corporation, by ordinance, regulate the speed of all locomotives and railroad cars within the municipal corporation limits. Such ordinance shall not require a rate of speed of less than 4 miles an hour, and in villages having a population of 2,000 or less, it shall not require a rate of less than 8 miles an hour . . ."

classification of population; to-wit: a population of 2,000. It is submitted, perhaps boldly, that this statute does not meet the prerequisite constitutional requirements presently existing under Ohio law.[71]

Municipalities of Ohio have quite commonly enacted ordinances regulating the speed of railroads within the municipal limits. It is not infrequent for municipalities to set speed limits at 4, 8, 12, 16, 20 *ad infinitum* miles per hour. As might be expected these ordinances have been frequently attacked on a constitutional level. The propriety of such an attack was expressly approved long ago.[72] Some statutes have stood firm against the constitutional attack; many have fallen.[73] Each ordinance is peculiarly dependent upon the individual facts and circumstances existing in the municipality.[74] The principal constitutional modes of attack have been predicated upon the argument that the ordinances constitute an undue burden on interstate commerce or that the prescribed speeds are so inordinately low as to bear no substantial relationship between the public safety and the particular speed limit.

The Ohio General Assembly has not only passed an enabling provision providing for regulation of any excessive speed of railroad trains, but it has also passed a statute to increase the speedy flow of railroad traffic. Ohio Rev. Code § 559.821 prohibits any unnecessary obstruction by locomotive and cars of a crossing for longer than 5 minutes. The gravamen of the above mentioned statute is contained in the language "unnecessary obstruction." Merely because the railroad blocks a crossing for a period longer than 5 minutes does not in itself constitute a violation of the statute. A further showing must be made that the obstruction was "unnecessary."[75] As has been mentioned before, violation of this sec-

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[71] The Ohio Supreme Court has unequivocably held that there can be no subclassification of municipalities in respect to state legislation except on the basis of 5,000 population — the constitutional classification separating cities and villages. In City of Elriah v. Vandenmark, 100 Ohio St. 365, 126 N.E. 314 (1919), the Ohio Supreme Court succinctly stated: "It having been declared by the constitution that the municipalities of the state should be classified upon the basis of cities and villages, it must be presumed that it is intended that there should be no further classification for the purpose of legislation affecting municipal government." This constitutional precept has not been subsequently altered, modified or changed and has been recently explicitly re-affirmed by the Ohio Supreme Court: Sawyer v. Cincinnati, 157 Ohio St. 515, 106 N.E. 2d 286 (1952); see City of Mansfield v. Endly, 38 Ohio App. 528, 176 N.E. 462 (1931); Mallison, *General Versus Special Statutes in Ohio*, 11 OHIO ST. L.J. 462 (1950).

[72] Toledo C. & O. Rd. v. Miller, 108 Ohio St. 388, 140 N.E. 617 (1923).

[73] For example, Weiler v. Penna. Rd., 34 Ohio L. Abs. 483, 28 N.E. 2d 792 (1939).

[74] Toledo C. & O. Rd. v. Miller, see note 72, *supra*.

[75] Cincinnati v. Luckey, 153 Ohio St. 247, 91 N.E. 2d 477 (1950).

tion does not confer a benefit to travelers except where there has been a loss due to a delay in travel.[76] The protection afforded by this statute falls short of applying to railroad crossing collisions. It is unconstitutional for a municipality to enact an ordinance which is in direct conflict with this statute. It has been held that an ordinance which absolutely prohibits a railroad from blocking a highway in the city for longer than 10 minutes is unconstitutional as being unreasonable. The court's reasoning is that the temporal restriction was so fixed as to disallow reasonable contingencies beyond the control of the railroad.[77] Finally, throughout this section, it must be kept in mind that if the traveler conducted his activity so that the excess speed of the railroad was not a causal factor in precipitating the collision, then the excess speed of the railroad is not the proximate cause of the accident.[78]

Duty of a Traveler

Duty of the Operator of a Vehicle

The rule, so "oft said" as to become trite, is well settled that an operator of a vehicle has the duty to look and listen at a railroad crossing. Depending upon the circumstances, it may be necessary for the operator to stop.[79] If a particular crossing is such that a reasonable person would not be put on notice of the presence of the crossing, then no duty to look and listen would arise.[80] However, the operator is contributorily negligent as a matter of law in failing to stop if a train has already pre-empted the crossing. The presence of unfavorable atmospheric conditions reducing a clear view will not alter this rule.[81] The negligence of the traveler is not predicated upon any failure to look and listen for approaching railroad trains, but it is said to be founded upon the failure of the traveler to maintain an assured clear distance.[82] If the railroad has not placed any extra-statutory signals (electric warning devices, gates, or watchmen) at a crossing, then the rule is quite clear that the traveler must exercise his sense of sight and hearing in such a manner as to be effective. Stated in different terms, the traveler must look and listen from the last place where he could

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[76] 6 Ohio St. L.J. 234 (1940).

[77] Cincinnati v. Luckey, see note 75, *supra.*

[78] Clark v. B. & O. Rd., see note 22, *supra;* Lynch v. Penna. Rd., 48 Ohio App. 295, 194 N.E. 31 (1934).

[79] B. & O. Rd. v. Davidson, 19 Ohio L. Abs. 406 (1935).

[80] Thus, if the railroad fails to mark a crossing with signs and the crossing is situated in such a manner as not to be reasonably discernible, the duty to look and listen would be inapplicable. Zirkoff v. Penna. Rd., 86 Ohio App. 84, 90 N.E. 2d 148 (1948).

[81] Reed v. Erie Rd., 134 Ohio St. 31, 15 N.E. 2d 637 (1938); Toledo Rd. v. Hughes, 115 Ohio St. 562, 154 N.E. 916 (1926).

[82] Skinner v. Penna. Rd. Co., 127 Ohio St. 69, 186 N.E. 722 (1933); Patton v. Penna. Rd., see note 5, *supra.*

avoid injury.[83] This locus would be just before going onto the track or far enough away that the traveler could cross the track in safety from that particular point; or if after starting across the tracks, the traveler could by the exercise of ordinary caution avoid the accident, this is then the place of effective looking. For example, if the driver can ascertain whether the track is clear without bringing the vehicle to a stop, then he has no duty to stop.[84] Yet, if a clear view of the track can only be made possible by stopping, then such action is mandatory as a matter of law.[85] However, the mere fact that the traveler did stop, look and listen will not discharge his duty if the exercise of looking and listening was not made from a point where it would have been effective.[86] For instance, the Ohio courts have held that where the crossing is obstructed, a traveler can be negligent as a matter of law where he looks in both directions from a distance of 60 feet,[87] 10 feet,[88] and 5 to 10 feet,[89] whether the traveler stops or not; of course, each case depends upon its own peculiar facts. Suppose a clear view cannot be obtained even by stopping the vehicle; a further problem then arises as to whether the traveler owes a duty to leave his vehicle and look up and down the track. Due to a paucity of Ohio authority, the question cannot be resolved with any degree of confidence. Numerous Ohio federal court decisions prior to 1938 held that the traveler did in fact have the duty to leave his vehicle and look for a train where a clear view could not otherwise be obtained.[90] A recent federal case has intimated that perhaps such a rule might be properly invoked by the Ohio judiciary.[91] However, an Ohio Court of Appeals has said that a jury question is presented on the issue of ordinary care where the driver could not have time to re-enter his vehicle and safely drive across the right-of-way even if he emerged from his automobile and looked up and down the right-of-way.[92]

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83 Detroit, Toledo & Ironton Rd. v. Rohrs, 114 Ohio St. 493, 151 N.E. 714 (1926); Penna. Rd. v. Rusynik, 117 Ohio St. 530, 159 N.E. 826 (1927); Lang v. Penna. Rd., 59 Ohio App. 345, 18 N.E. 2d 271 (1938); B. & O. Rd. v. Joseph, 112 F. 2d 518 (6th Cir. 1940), *cert. denied* 300 U.S. 682 (1941).

84 B. &. O. Rd. v. Davidson, 19 Ohio L. Abs. 406 (1935).

85 B. & O. Rd. v. Davidson, see note 84, *supra;* Traction Co. v. Smith, 23 Ohio Cir. Ct. 610 (1912).

86 Detroit, Toledo & Ironton Rd. v. Rohrs, see note 83, *supra;* N.Y.C. Rd. v. Quillan, 15 Ohio L. Abs. 524 (1933).

87 Burnett v. Erie Rd., 39 Ohio L. Abs. 621 (1944).

88 Price v. N.Y.C. Rd., 91 F. Supp. 898 (N.D. Ohio 1950).

89 Detroit, Toledo & Ironton Rd. v. Yeley, see note 17, *supra.*

90 B. & O. Rd. v. Goodman, 275 U.S. 66 (1927); Leuthold v. Penna. Rd., 33 F. 2d 758 (6th Cir. 1929).

91 Burnett v. Erie Rd., see note 87, *supra.*

92 B. & O. Rd. v. Metz, 6 Ohio L. Abs. 301 (1927).

Innumerable mitigating factors have been advanced in an attempt to modify the rule that the operator must look and listen from a point wherein the exercise of the traveler's faculties could be effective. The mere fact that the traveler testifies that he did stop, look and listen does not necessarily present a jury issue. Under what has been termed the doctrine of uncontrovertible facts, a court will disregard the testimony of the traveler as having no probative value where if the traveler had looked and listened in a reasonable manner the collision could not have occurred.[93] Another purported legal excuse is presented when the streets were in such a slippery condition that it was allegedly impossible for the traveler to stop his vehicle short of the known crossing. While such an argument might perhaps have some validity in certain circumstances, the excuse has been held to be nugatory as a matter of law where the traveler slid 25 feet on an oily street into a train.[94] The traveler must keep the car under control and his operation in keeping his vehicle under control will be dependent on the condition of the street.

Another justification for failing to discern an approaching train is premised on the basis that the view of the right-of-way was obstructed. Temporary obstructions such as smoke, steam or passing trains do not justify driving a vehicle onto the railroad track. The traveler must wait until such temporary obstructions cease. Failure to wait under such conditions constitutes negligence as a matter of law.[95] However, if the steam or smoke is not momentary, but is continuous, the traveler may be justified in proceeding across the right-of-way.[96] It is not an excuse for an operator to fail to see an approaching train where he would be required to have turned his head to the side and rear 130° to make his looking effective.[97] Nor is an obstruction caused by a passenger in the front seat a legal excuse for failing to discern the train.[98] Innumerable times a traveler will maintain that it was impossible for him to see an approaching train because of the limited visibility due to fog, sleet, rain, snow and other atmospheric conditions. The Ohio courts have embraced this justification with something less than zealous fervor. When the danger is increased, the courts with marked unanimity impose a greater care and caution on the travel-

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[93] Patton v. Penna. Rd., see note 5, *supra;* Continental Baking Co. v. Rd. Co., 87 Ohio App. 505 (1950); Detroit, Toledo & Ironton Rd. v. Rohrs, see note 83, *supra;* N.Y.C. Rd. v. Quillan, see note 86, *supra.*

[94] Lynch v. Penna. Rd., 48 Ohio App. 295, 194 N.E. 31 (1934).

[95] Penna. Rd. v. Rusynik, see note 83, *supra;* Eschenbach v. Hines, 23 Ohio N.P.(N.S.) 255 (1921).

[96] Biery v. Rd. Co., 156 Ohio St. 75, 99 N.E. 2d 895 (1951).

[97] Price v. N.Y.C. Rd., see note 88, *supra.*

[98] *Ibid.*

er.[99] Thus, the mere fact that visibility is reduced to a few feet because of fog does not in itself legally justify the driving of the vehicle onto the track into the path of an oncoming train.[100] In such a situation, it is incumbent upon the operator to exercise with greater diligence his duty of listening and looking. Where a train on a dark snowy night, operating without headlights, approached a crossing whose view was obstructed, the traveler still had a duty to listen. Moreover, the fact that the traveler testified that he did not "hear the train is not sufficient to establish that he listened in a manner which would make such listening effective where there is positive evidence adduced that the train whistle was sounded."[101] Even in relatively similar circumstances where the train whistle was not sounded, it has been held that if the traveler listened he must have heard the noise of the train. The court took judicial cognizance of the fact that a train makes a great amount of noise. So even where no evidence was introduced as to the effectiveness of listening, the court might well assume that the traveler could have heard the train.[102] However, under relatively similar circumstances where additional positive evidence is adduced to the effect that there were distracting noises[103] or there was a high wind blowing,[104] which would make it exceedingly difficult to hear an approaching train, a jury question is presented as to whether the traveler exercised reasonable care. It would seem then that where weather conditions substantially reduce visibility the traveler may well be held negligent as a matter of law in proceeding across a known railroad track except where special circumstances exist as, for example, where the train, proceeding through the darkness without lights fails to whistle and surrounding conditions could drown out the noise of the train, or where the circumstances are such that the traveler could have become reasonably confused. If there are more permanent obstructions to the view of a right-of-way, as buildings and standing trains, then again the traveler has a greater duty to look and listen. Permanent physical obstructions of view do not legally justify driving onto the track where it is possible to exercise the faculties of sight and hearing just before going onto the track which would enable the traveler to hear or perceive the train.[105] Where the view is obstructed before going

[99] B. & O. Rd. v. McClellan, 69 Ohio St. 142, 68 N.E. 816 (1903); Bowman v. B. & O. Rd., 86 Ohio App. 129, 90 N.E. 2d 390 (1949).

[100] Cummins v. Erie Rd., 63 F. 2d 816 (6th Cir. 1933); Toledo Terminal Rd. v. Hughes, 115 Ohio St. 562, 154 N.E. 916 (1926).

[101] Continental Baking Co. v. Rd. Co., see note 93, *supra*.

[102] Patton v. Penna. Rd., see note 5, *supra*.

[103] N.Y.C. & St. L. Rd. v. Van Dorp, 36 Ohio App. 530, 173 N.E. 445 (1930).

[104] Zirkoff v. Penna. Rd., 86 Ohio App. 84, 90 N.E. 2d 148 (1948).

[105] C.C.C. & I. Ry. v. Elliott, 28 Ohio St. 340 (1876).

across several tracks and the traveler starts across, there is a continuing duty to look and listen, and if the view then becomes unobstructed so that the traveler may avoid a collision, the prior obstructions to his view do not constitute an excuse. It is improper for the traveler to devote his entire attention to operating the vehicle across the track.[106] Therefore, if the railroad produces evidence to show that it was possible for a traveler to have looked and listened and in so doing, to have avoided the accident, then the traveler is guilty of negligence as a matter of law, even though he positively testifies that he looked and listened in an effective manner. However, it may be possible to avoid the incidence of this well settled rule where circumstances are such that the traveler could have reasonably been confused or placed in a position of emergency, or where the traveler could not reasonably know of the crossing.

What if the railroad places extra-statutory warnings at the crossing such as automatic gates, electric blinkers or a watchman? What effect will such additional measures have upon the standard of care of the traveler?

Ohio Rev. Code § 4611.62 makes it unlawful for a traveler to proceed over a crossing when automatic lights are blinking, automatic gates are closed or a watchman signals for the traveler to stop. Violation of this section has been construed to make the traveler negligent *per se*.[107] An interesting problem is presented where the traveler seeks to avoid the incidence of this statute by averring that it was impossible for him to stop at the crossing. The Ohio Supreme Court has recognized the possibility of a legal excuse to avoid the incidence of a safety statute. However, the court has not displayed any discernible solicitude toward its application. The traveler must show that the failure to comply with the statute was caused by something over which the driver had no control, an emergency not of the driver's making causing failure to obey the statute and something that would make it impossible to comply with the statute.[108] The extent to which a legal excuse for the violation of Ohio Rev. Code § 4611.62 may be recognized is presently a matter of speculative conjecture.

A problem which has created immeasurable confusion and inconsistency in the Ohio law arises when the extra statutory protection fails. Suppose, due to mechanical difficulties, an electric blinker fails to inform the traveler of the imminent approach of a fast moving train. Suppose the automatic gates are open when the

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[106] Eschenbach v. Hines, see note 95, *supra*.

[107] Brown v. Penna. Rd., 76 Ohio App. 171, 61 N.E. 2d 163 (1945); Penna. Rd. v. Folger, 170 F. 2d 238 (6th Cir. 1940).

[108] Bush v. Transfer Co., 146 Ohio St. 657, 67 N.E. 2d 851 (1946).

traveler arrives at the crossing, but an express train is but a few hundred yards away. What would be the result if a watchman oversleeps and fails to signal the approach of the train or, worse yet, the watchman signals the passenger to cross the track when the train is roaring close to the crossing? The Ohio Supreme Court has adopted two divergent and conflicting rules pertinent to this area. In the 19th century, the Ohio Supreme Court held that a traveler may place some reliance upon the safeguard afforded by the extra-statutory protection. It was held that the lack of warning from extra-statutory devices constitutes an invitation to cross. The traveler, however, under this view still is burdened by the duty to look and listen in a "reasonable manner."[109] This rule was ostensibly followed over a period of time. In 1931, the Ohio Supreme Court[110] held that extra-statutory signals are merely meant as warnings, not as an invitation to cross. The syllabus of the case said that the traveler must look and listen from a point sufficiently distant from the track to halt his vehicle and thereby prevent the collision. The actual effect of this case is to make no distinction as to whether the crossing is or is not protected by extra-statutory signals, insofar as affecting the duty of a traveler to exercise reasonable care. A subsequent Supreme Court decision has at least inferentially conflicted with this case.[111] The Ohio Supreme Court in 1951 expressly recognized the conflict.[112] However, the facts of that 1951 case were insufficient to render a distinct holding in resolution of this conflict. The 1951 case impliedly indicated a probable tendency to follow the rule that the extra-statutory signal was an invitation to cross the track and not merely a warning.[113] In any event, under either view the traveler is not absolved from all duty to look and listen merely because the extra-statutory warning is not given. If we follow the rule which probably exists in Ohio today, then the extent to which a traveler must exercise this duty is of course a question dependent entirely upon the peculiar facts existing at each individual crossing. The following decisions point up the contrast and the confused language existing in the Ohio law on this question: Where the traveler does not look or listen until he sees he cannot stop, it has been held that he is negligent as a matter of law even though automatic signals are not working;[114] the traveler must exercise his faculties of hearing and sight at a sufficient distance from the track to enable him to stop and avoid the accident and his failure will render him contributori-

[109] Railway Co. v. Schneider, see note 16, *supra*.
[110] C. D. & M. Elec. Co. v. O'Day, 123 Ohio St. 638, 176 N.E. 569 (1931).
[111] Lohrey v. B. & O. Rd., 131 Ohio St. 386, 3 N.E. 2d 54 (1936).
[112] Tanzi v. Rd. Co., 155 Ohio St. 149, 98 N.E. 2d 39 (1951).
[113] *Id.* at 157, 98 N.E. 2d at 43.
[114] C. D. & M. Elec. Co. v. O'Day, 123 Ohio St. 638, 176 N.E. 569 (1930).

ly negligent as a matter of law even though automatic devices were inoperative.[115] A dictum has been stated that "we can readily say that had the warning sign at this particular crossing been an automatic signal, its failure to operate might not have constituted an implied invitation to cross."[116] Contrast the language of the above-mentioned decisions with the following: Where the railroad was negligent in failing to give a whistle and where both a watchman and an automatic gate failed to indicate the approach of a train, the traveler is not negligent as a matter of law in proceeding over the crossing.[117] The traveler may rely upon automatic blinkers and is not contributorily negligent if under the circumstances he exercised reasonable care.[118] A jury question is presented as reasonable minds might well differ.[119]

Reasonable conduct of the traveler is dependent upon the type of extra-statutory signal adopted by the railroad. If the crossing is protected by a watchman and the traveler is unaware of this situation, the fact that the watchman fails to appear to give a warning cannot alter the traveler's standard of care;[120] the traveler must look and listen and if necessary, stop, in the same manner as if there were no extra-statutory signal located at that particular crossing. If, however, the operator of the vehicle is cognizant of the practice of the railroad to give warning at this crossing through a watchman, then the traveler may rely upon the absence of the watchman as an indication that the right-of-way is free from approaching trains.[121] This distinction as to watchmen would be inapplicable to automatic flashers and gates, since an automatic flasher or gate would be readily visible to all travelers. A traveler may place greater reliance upon a watchman, standing in clear view, who fails to warn of the approach of the train than upon an automatic signal device which indicated the track is clear. The rationale being that it is far more plausible for a mechanical device to break down, than it would be for a watchman to fail to see a large oncoming train.[122]

The Ohio Supreme Court has held that even though an extra-statutory warning is inoperative, the traveler must still exercise

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115 Penna. Rd. v. Tice, 18 Ohio L. Abs. 322 (1934).

116 However, this same court has held that a distinction must be made between inactive conduct of a watchman and inactive operation of mechanical signal devices. Thomas v. Penna. Rd., 70 Ohio App. 191, 200, 45 N.E. 2d 776, 780 (1942).

117 Kasly v. B. & O. Rd., 23 Ohio App. 185, 155 N.E. 174 (1926).

118 Toledo Term. Rd. v. Hughes, see note 81, *supra.*

119 N. Truck Line Co. v. W.L.E. Ry., 77 Ohio App. 253, 66 N.E. 2d 782 (1945).

120 Tanzi v. Rd., see note 112, *supra.*

121 *Ibid.*

122 Filkosky v. Penna. Rd., 78 Ohio App. 280, 69 N.E. 2d 660 (1946).

"due care" while in the process of crossing the track. Accordingly, the court has said that if a crossing is protected by gates and the operator of a vehicle starts across a crossing while the gates are open but in the process of crossing, the gates close, the traveler will be guilty of contributory negligence as a matter of law in not then looking for the train.[123]

In conclusion, it might be said that the law shaping the vehicular driver's standard of care at a railroad crossing is not only at times confusing but seemingly inequitable. The philosophy of the courts of Ohio may perhaps be accurately exemplified by the following statement of judicial policy: "In this age of numerous and often speedy motor vehicles on the highways, our courts are not inclined by their judgments to encourage highway travelers to engage in a race with death at railroad grade crossing.[124]

Duty of a Passenger In a Vehicle

The problem herein presented concerns itself with the standard of care applicable to a passenger in a vehicle when approaching and crossing a railroad intersection. In the absence of an agency relationship, the negligence of the operator is not imputed to the passenger under Ohio law.[125] Although a passenger has a lesser duty than the driver to look and listen for dangers, the general rule is said to be that a passenger is not entirely relieved of the duty to look and listen for trains and to warn the driver thereof. The test as to what particular action may or may not be required of a passenger is contained in the magic words "reasonable care under similar circumstances."[126] While the words are explicit, their application in a particular circumstance is not concomitantly lucid.

Text writers and cases have occasionally flatly stated that there is an absolute duty for guests to look and listen at railroad crossings and warn the driver of dangerous conditions.[127] Such language tends to equate the duties of vehicular passengers and operators. It is submitted that such statements constitute a gross oversimplifi-

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123 Lohrey v. B. & O. Rd., 131 Ohio St. 386, 3 N.E. 2d 54 (1936).

124 Ballmer v. Penna. Rd., 59 Ohio App. 221, 228, 17 N.E. 2d 435, 438 (1938).

125 McLaughlin v. N.Y. Rd., 130 Ohio St. 527, 200 N.E. 757 (1936).

126 H.V. Ry. Co. v. Wyckle, 122 Ohio St. 391, 171 N.E. 860 (1930); Toledo Railways & Light Co. v. Mayers, 93 Ohio St. 304, 112 N.E. 1014 (1916); B. & O. Rd. v. Brown, 36 Ohio App. 404, 173 N.E. 298 (1929); Strider v. Penna. Rd., 60 F. 2d 237 (6th Cir. 1932).

127 "Yet the guest is as much bound to look and listen for an approaching train as the driver and may be guilty of contributory negligence in failing to do so." 34 O. Jur. Railroads § 1170, citing an Ohio Supreme Court case where the passenger had expressly assumed the driver's duty to listen; "Ohio cases support the view that guests are required to look and listen at railroad crossings and of course warn the driver of approaching trains at crossings known to and perceivable by them and that is as it should be." Collins v. Penna. Rd., 76 Ohio App. 115, 63 N.E. 2d 225 (1944) (dictum).

cation of the Ohio law. We have seen that the Ohio courts have rather rigidly and constantly held an operator to be negligent as a matter of law in failing to look and listen. Yet when the legal question concerns the alleged negligence of a guest, the Ohio cases have, except in exceptional circumstances held that a jury question is presented.[128] Actually, the standards of care pertaining to guests and operators are most distinct. It is not particularly difficult to discern why the duties are not synonymous when, of necessity, the following factors must be considered before a guest can be said to be negligent in failing to discharge his duty to look, listen and warn: The guest either must or should know of the railroad crossing; if he does not, there is simply no duty to warn the driver.[129] If the guest has knowledge of a particular crossing, it must be further shown that the guest was in a position to observe the right-of-way.[130] Yet, assuming knowledge of the crossing and an ability to discern the right-of-way, the guest, after exercising his duty of looking and listening, must have had a reasonable time to inform the driver of the approaching danger.[131] However, even assuming that the guest had time to warn the driver of a known train, the guest may still not be negligent in failing to so warn the driver. It has been held that warning the driver or advising him what to do, may, under certain circumstances, involve more danger than to "maintain silence and not interfere."[132] Small wonder that such a paucity of decisions holding the passenger guilty of negligence as a matter of law exists. Even though the vast majority of cases are submitted to the jury, it has been sometimes held that the passenger is negligent as a matter of law. A jury question is not presented if a passenger, in a position both to see and hear the train, responds in the negative when asked whether he does see or hear a train.[133] Reasonable minds cannot differ if the passenger alleges in his petition that he kept a constant lookout ahead, and the evidence subsequently shows that the passenger had a reasonable opportunity to see or hear the train; the passenger is negligent as a matter of law.[134] A relatively old case has held a passenger negligent as a matter of law where he did not warn the driver to stop before

[128] H. V. Ry. v. Wyckle, see note 126, *supra; see* Huntsman v. C. & O. Ry., 82 Ohio App. 79, 87, 81 N.E. 2d 118, 122 (1947); Tyler v. H.V. Ry., 28 Ohio App. 88, 162 N.E. 623 (1927); B. & O. Rd. v. Joseph, 112 F. 2d 518 (6th Cir. 1940).

[129] Keiner v. The Wheeling & Lake Erie Rd. Co., 34 Ohio App. 409, 171 N.E. 253 (1930).

[130] *Id.* It is possible that a guest may be negligent in not being in a proper position to maintain a lookout.

[131] B. & O. Rd. v. Brown, 36 Ohio App. 404, 173 N.E. 298 (1929).

[132] *Ibid.*

[133] See Knaff v. N.Y.C. Rd., 55 Ohio L. Abs. 193, 86 N.E. 2d 814 (1949).

[134] Coleman v. N.Y.C. Rd. Co., 36 Ohio L. Abs. 241, 39 N.E. 2d 157 (1941).

crossing a track obscured by temporary smoke and steam.[135] Such a decision might be unable to withstand analytical scrutiny under prevailing Ohio law. If a passenger expressly assumes the driver's duty to listen for the approach of trains, the passenger then has the same duty as would a driver insofar as there has been an assumption of duty.[136]

Finally, it must be well remembered that the legal principles and standards pertinent to passengers are not inflexible; they have been enunciated by the judiciary in such a manner that if the facts so require they are capable of great breadth and elasticity.

Earl E. Mayer, Jr.

CIVIL PROCEDURE — ESTOPPEL BY JUDGMENT — NEGLIGENCE IN PROPERTY DAMAGE AND PERSONAL INJURY

Plaintiff brought a negligence action for personal injuries against defendants (master and servant) arising from an intersection collision. The defendants' answers contained allegations of general denial, contributory negligence, and the affirmative defense of res judicata in that the present plaintiff had been adjudged negligent in a previous action. The plaintiff's reply in regard to the new matter of res judicata was that the suit referred to by the defendants had been a suit for property damages only and was therefore not res judicata in the present action. The lower courts ruled for the plaintiff. On appeal, *held* reversed. The principle of estoppel by judgment precluded the plaintiff from recovering in the instant case. *Mansker v. Dealers Transport Co.*, 160 Ohio St. 255, 116 N.E. 2d 3 (1953).

The lower courts, in holding that the previous suit for property damages was not binding in the present suit, had relied on language in *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 337, 61 N.E. 2d 707, 716 (1945), which stated that "(a)n act of a defendant which might not be regarded as an unreasonable risk as to plaintiff's property, might well be considered an unreasonable risk as to his person." The reversal of the lower courts' decisions in the principle case makes it clear that the above quoted language in *Vasu v. Kohlers, Inc., supra,* will not prevent the application of the principle of estoppel by judgment to ordinary negligence actions such as the principal case. The Supreme Court stated in the principal case at 160 Ohio St. 259, 116 N.E. 2d 6, "The fact that in the former case damage to property was involved whereas in the present case injury to the person is the subject of the action makes no difference; the standards by which negligence is determined are the same in both instances."

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135 Williams v. Railway Co., 27 Ohio Cir. Ct. (1917).

136 Railroad Co. v. Kistler, see note 16, *supra.*